

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No.: 15-cv-80946-MIDDLEBROOKS

JAMES D. SALLAH, not individually
but solely in his capacity as Court-Appointed
Receiver for JCS Enterprises, Inc. d/b/a
JCS Enterprises Services, Inc., T.B.T.I. Inc.,
My Gee Bo, Inc., JOLA Enterprise, Inc., and
PSCS Holdings, LLC.,

Plaintiff,

v.

JOSEPH SIGNORE, individually, and
LAURA SIGNORE, individually,

Defendants.

ORDER DENYING MOTION TO DISMISS

THIS CAUSE comes before the Court on Motion to Dismiss (“Motion”) filed by Defendants Joseph Signore and Laura Signore on August 11, 2015. (DE 18). Plaintiff James D. Sallah filed a Response in Opposition on August 24, 2015. (DE 19).

I. Background

Defendants move to dismiss the Complaint under Fed. R. Civ. P. 12(b)(5) for insufficient service of process. Defendants argue Plaintiff “did not personally service either Defendant[,] leave the summons at the Defendants’ residence with a person of suitable age and discretion who resides there[, or] serve the summons on any individual who was designated by law to accept service of process on behalf of the Defendants.” (DE 18 at ¶ 4). Additionally, Defendants assert that they have a “video camera tape showing the process server sitting in his car for hours watching their abode. That after some time, the process server just dropped the summons and complaint outside the door of the residence of Defendants and left.” (DE 18 at 2).

Plaintiff responds that service was effectuated in accordance with Florida law. According to the declaration of Plaintiff's process server, Adrian Becerra ("Becerra"), Laura Signore refused to open the door for Becerra:

After knocking and waiting for several minutes, subject refused to open the door. I watched her walking inside the house. I did a search on the internet [sic] and confirmed the picture of her on the internet [sic] is the same person I saw in the house. In a loud voice, I explained the purpose of my visit and the contents of the documents. Process was left at the front door."

(DE 16-1 at 2; DE 17-1 at 2). Plaintiff further argues that because service was proper on Laura Signore, substitute service was effectuated on her husband, Joseph Signore. (DE 19 at 11-12).

For the reasons stated below, Defendants' Motion is denied.

II. Legal Standard

A motion to dismiss under Rule 12(b)(5) challenges the sufficiency of service of process. Fed. R. Civ. P. 12(b)(5). The procedural requirements for service of process are set forth in Rule 4(e), which provides, *inter alia*, that a complaint may be served in accordance with the law of the state where the district court is located. *See* Fed. R. Civ. P. 4(e)(1). In Florida, proper service of process may be made

by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents. Minors who are or have been married shall be served as provided in this section.

Fla. Stat. § 48.031(1)(a).

Defendants who wish to challenge the sufficiency of service of process must do so in the answer to the complaint or a pre-answer motion. *See Sanderford v. Prudential Ins. Co. of America*, 902 F.2d 897, 900 (11th Cir. 1990). A challenge to sufficiency of service by a defendant must specifically describe how service has failed to meet the procedural requirements of Rule 4. *See O'Brien v. R.J. O'Brien & Assocs., Inc.*, 998 F.2d 1394, 1400 (7th Cir. 1993). Once the defendant has challenged service of process, the plaintiff has the burden to show a *prima facie* case of proper service. A signed return of service is *prima facie* evidence of proper service. *See Blair v. City of Worcester*, 522 F.3d 105, 111-12 (1st Cir. 2008); *see also Udoinyon v. The Guardian Security*, 440 F. App'x 731, 735 (11th Cir. 2011) (finding process

server's return of service established *prima facie* validity and timeliness of service). If the plaintiff makes a *prima facie* case, the defendant must then put forth "strong and convincing evidence" of insufficient process. *O'Brien*, 998 F.2d at 1398 (quoting *Hicklin v. Edwards*, 226 F.3d 410, 414 (8th Cir. 1955)).

III. Discussion

a. *Service of Process on Laura Signore*

Defendants move to dismiss under Rule 12(b)(5) on the basis that Plaintiff failed to properly serve Laura Signore. Plaintiff has made a *prima facie* case of proper service by submitting Becerra's return of service for Laura Signore, which details Becerra's compliance with Florida service procedures. *See* DE 17-1.

In Florida, service of process on an individual may be made without the individual physically accepting the summons and complaint from a process server. *See Haney v. Olin Corp.*, 245 So. 2d 671, 673 (Fla. 4th DCA 1971) ("Appellant concedes that delivery does not require that a copy of the summons and complaint be placed in the defendant's hand, nor, for that matter, that the defendant be even physically touched with the suit paper."). Under Florida law, service is proper if the party being served attempts to avoid service, and the process server "leaves the papers at a place from which such person can easily retrieve them and takes reasonable steps to call such delivery to the attention of the person being served." *Olin Corp. v. Haney*, 245 So. 2d 669, 670-71 (Fla. 4th DCA 1971).

Service has been upheld by Florida courts in cases where the person being served has been seen in, or retreated back to, her house after seeing the process server, and where the server subsequently leaves the paper at the individual's residence. *See Haney*, 245 So. 2d at 674 (upholding service where "[person served] was physically present on the premises, was reasonably apprised of the officer's presence and purpose, and could have had the suit papers placed directly in his hands by the simple expedient of opening the door in response to the officer's request."); *see also S.E.C. v. Reinhard*, 352 F. App'x 309, 313 (11th Cir. 2009) ("Where, as here, the person to be served answers the door and then retreats into his residence, only to find the service papers at his door at a later date, process is deemed sufficient under Florida law."); *Liberman v. Commercial Nat'l Bank of Broward Cnty*, 256 So. 2d 63, 63-

64 (Fla. 4th DCA 1971) (finding proper service where appellant “sought to avoid service of process by the expedient of running into his house and closing the door upon seeing the process server approach [and then the process server] left a copy of process and suit papers in the mail box.”).

In this case, when Becerra attempted service, he saw a woman in the Signore’s home and confirmed on the internet that she was Laura Signore. (DE 16-1 at 2). Becerra then loudly knocked and announced his presence and purpose at the house. *Id.* Laura Signore evaded service by not answering the door when Becerra knocked or addressed her. *Id.* Accordingly, Becerra’s positive identification of Laura Signore, his knocking and announcing of his purpose for visiting the residence, and Signore’s failure to open the door, all support finding that Plaintiff properly served Laura Signore.

Because Plaintiff has made a *prima facie* case of proper service of process, the burden shifts to the Defendants to provide “strong and convincing” evidence of why service was not appropriate. *See O’Brien*, 998 F.2d at 1398. Defendants assert that they have a video tape showing Becerra sitting in his car watching their house and then dropping the summons and complaint at the front door. (DE 18 at 2). Notably, Defendants have not provided this video tape as an exhibit to their Motion. Assuming, however, that the tape depicts what Defendants describe, the tape still would not contradict Becerra’s sworn statements in the return of service. (DE 17-1 at 2). Becerra asserts that he left the service papers at the front door, as the tape would depict. However, Becerra also states that he left the papers only after seeing Laura Signore inside the house, attempting to get her to answer the door, and describing the purpose of his visit and contents of the documents. (DE 17-1 at 2). Defendants have presented no evidence, by the video tape or otherwise, contradicting Becerra’s description of the events. They have not argued or shown: (1) Laura Signore was not home, (2) Becerra did not knock, (3) no one answered the door, or (4) Becerra did not loudly explain the purpose of his visit and the contents of the documents. Thus, because Becerra’s actions as described in his return of service comport with Florida service procedures, and because Defendants have not met their burden to show by “strong and convincing evidence” that service on Laura Signore was ineffective, Defendants’ Motion to Dismiss based on improper service of Laura Signore is denied.

b. Service of Process on Joseph Signore

Defendants also move to dismiss under Rule 12(b)(5) for insufficient service of process on Joseph Signore. Plaintiff has made a *prima facie* case of proper service by submitting the return of service for Joseph Signore, which details how substitute service was effectuated in accordance with Florida law. *See* DE 16-1.

Under Florida law, substitute service of process may be accomplished by leaving the summons and complaint at the defendant's usual place of abode with a household member over 15 years of age. *See* Fla. Stat. § 48.031. When substitute service of process is employed, "the process server must inform the person with whom the copies are left of their contents." *Olin Corp.*, 245 So. 2d at 670; *see also Dowd Shipping, Inc. v. Lee*, 354 So. 2d 1252, 1252-53 (Fla. 4th DCA 1978) (upholding substitute service where the server advised [the spouse of the person being served] the purpose of the visit and "told her the contents of the papers he wished to deliver, i.e., the summons and complaint."). Leaving the documents outside of the defendant's place of abode will not invalidate substitute service when there is an individual inside of the house who could receive substitute service, knows of the contents of the documents, but refuses to answer the door. *See Dowd Shipping*, 354 So. 2d at 1252-53 (finding proper substitute service when an officer attached the summons and complaint to the gate of a house, where the wife of the person to be served had been in the house on the phone with the officer, where the officer had described the contents of the papers to the wife, and where the wife refused to allow the officer inside the gate).

In this case, substitute service on Joseph Signore was accomplished by service on Laura Signore. Becerra saw Laura Signore walking around the house the day he went to the Signore residence. (DE 16-1 at 2). Becerra then loudly explained the purpose of his visit and the contents of the documents, as required for valid substitute service. (DE 16-1 at 2). Finally, he left the documents on the front step after Laura Signore would not come to the door.

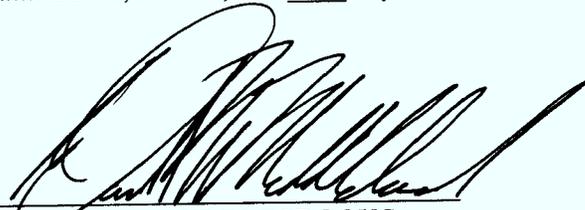
Because Plaintiff has entered a return of service for Joseph Signore (DE 16-1) that describes proper substitute service, the burden then shifts to the defendants to provide "strong and convincing"

evidence of insufficient service. Defendants have put forth no evidence, except referring to an alleged video tape, discussed section III.a., *supra*, to support a claim of insufficient service on Joseph Signore. For the same reasons discussed above, the video tape does not present strong or convincing evidence that service was improper. Further, Defendants have not provided evidence that Laura Signore was not at home, was under the age of 15, or was unaware of the contents of the documents Becerra was leaving on the front door that day. Accordingly, because Plaintiff has shown proper substitute service on Joseph Signore, and Defendants have failed to present strong and convincing evidence of deficient service, Defendants' Motion to Dismiss as to Joseph Signore is denied. Accordingly it is hereby

ORDERED AND ADJUDGED as follows:

- (1) Defendants' Motion to Dismiss (DE 18) is **DENIED**.
- (2) Plaintiff's Motion for Hearing (DE 20) is **DENIED AS MOOT**.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 16 day of October, 2015.


DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record